IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

RSA.No. 1131 of 2006()

AS.2/2005 of ADDL. DISTRICT COURT, NORTH PARAVUR
OS.500/2000 of MUNSIFF COURT,ALUVA

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: APPELLANT/3RD RESPONDENT/3RD DEFENDANT:

VIJAYALAKSHMI,
AGED 47, D/O.MADHAVI, KUMARAMANGALA VEEDU,
RESIDING AT HOUSE NO.AMC 18/238, RAIL ROAD,
ALUVA TOWN.

BY ADV. SRI.T.K.VENUGOPALAN
SRI.SHIBU JOSEPH
SRI.K.C.KIRAN

RESPONDENTS: APPELLANT AND RESPONDENTS 2 AND 4 TO 23:

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1. NARAYANAN, AGED BAOUT 68,
S/O.MADATHIL VEETIL SEKHARAN, RESIDING AT
VARIKKATTU, PURAYAR KARA, CHENGAMANAD VILLAGE,
ALUVA TALUK.

2. NALINI, AGED ABOUT 48,
D/O.MADHAVI, KUMARAMANGALAM VEEDU, RESIDING AT
HOUSE NO.AMC 18/238, RAIL ROAD, ALUVA TOWN,
NOW MADATHIL (KOTTILAPPILLY) VEEDU.

3. MOHANDAS, AGED ABOUT 43,
S/O.MADHAVI, KUMARAMANGHALAM VEEDU,
RESIDING AT HOUSE NO.AMC 18/238, RAIL ROAD,
ALUVA TOWN.

4. KUMARI, AGED ABOUT 43,
D/O.MADHAVI, KUMARAMANGALAM VEEDU, RESIDING AT
HOUSE NO.AMC 18/238, RAIL ROAD, ALUVA TOWN,
NOW MADATHIL (KOTTILAPPILLY) VEEDU.

5. LEENA, AGED ABOUT 33,
W/O.MOHANDAS, KUMARAMANGALAM VEEDU, RESIDING AT
HOUSE NO.AMC 18/238, RAIL ROAD, ALUVA TOWN,
NOW MADATHIL (KOTTILAPPILLY) VEEDU.

6. RAJAMMA, AGED ABOUT 48,
D/O.LATE PAVITHRAN, MALAYANKATTIL,
KOTTILAPILLY VEEDU, KEEZHMAD KARA,
ALUVA EAST VILLAGE.

7. BABY, AGED ABOUT 36, D/O.PAVITHRAN,
MALAYANKATTIL, KOTTILAPILLY VEEDU,
KEEZHMAD KARA, ALUVA EAST VILLAGE.

8. SATHEESAN, AGED ABOUT 38 YEARA,
S/O.PAVITHRAN, MALAYANKATTIL, KOTTILAPILLY VEEDU,
KEEZHMAD KARA, ALUVA EAST VILLAGE.

9. SHEELA, AGED 32 YEARS,
D/O.PAVITHRAN, MALAYANKATTIL, KOTTILAPILLY VEEDU,
KEEZHMAD KARA, ALUVA EAST VILLAGE.

10. UNNI, AGED ABOUT 25 S/O.PAVITHRAN,
MALAYANKATTIL, KOTTILAPILLY VEEDU,
KEEZHMAD KARA, ALUVA EAST VILLAGE.

11. THAMPI, AGED ABOUT 27,
S/O.PAVITHRAN, MALAYANKATTIL, KOTTILAPILLY VEEDU,
KEEZHMAD KARA, ALUVA EAST VILLAGE.

12. GEETHA, AGED ABOUT 38,
D/O.LATE DHARMAN, S/O.LATE MADHAVI,
KOTTILAPPILLY VEEDU, KANIYAMKUNNU KARA,
U.C.COLLEGE (P.O.), ALUVA.

13. PREETHA, AGED ABOUT 34, D/O.DHARMAN,
KOTTILAPPILLY VEEDU, KANIYAMKUNNU KARA,
U.C.COLLEGE (P.O.), ALUVA.

14. SUDHEESH KUMAR, S/O.DHARMAN,
KOTTILAPPILLY VEEDU, KANIYAMKUNNU KARA,
U.C.COLLEGE (P.O.), ALUVA.

15. SUBHASHINI, W/O.DHARAMAN,
KOTTILAPPILLY VEEDU, KANIYAMKUNNU KARA,
U.C.COLLEGE (P.O.), ALUVA.

16. VASANTHI, W/O.LATE RAJAPPAN,
KOTTILAPPILLY VEEDU, KANIYAMKUNNU KARA,
KANIYAMKUNNU.

17. AJITH KUMAR, S/O.RAJAPPAN,
KOTTILAPPILLY VEEDU, NOW AT PALAMPARAMBATH,
TACHETTU VEEDU, DESOM (P.O.), KIZHAKE DESOM,
ALUVA.

18. ANITHA MOL, D/O.LATE RAJAPPAN,
KOTTILAPPILLY VEEDU, NOW AT PALAMPARAMBATH,
TACHETTU VEEDU, DESOM (P.O.), KIZHAKE DESOM,
ALUVA.

19. SANTHI, D/O.KOTTILAPPILLY MADHAVI,
WARRIATH VEEDU, KIZHAKKE DESOM, ALUVA.

20. RAMANI, D/O.KOTTILAPPILLY MADHAVI,
WARRIATH VEEDU, NOW RESIDING AT MACHATTIL VEEDU,
KIZHAKKE DESOM, ALUVA.

21. VIJAYAN, S/O.KOTTILAPPILLY MADHAVI,
KANIYANKUNNU KARA, KADUNGALLOOR VILLAGE.

22. USHAKUMARI, D/O.MADHAVI,
GREEN GATE, MEPURATHU COMPLEX,
N.H.BYE PASS, ALUVA.

BY ADV. SRI.AJU MATHEW
SRI.S.B.PREMACHANDRA PRABHU

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 1131 OF 2006

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DATED THIS THE 11th DAY OF JULY, 2007

JUDGMENT

Appellant is the third defendant in O.S.500 of 2000 on the file of Munsiff Court, Aluva. First respondent originally instituted RCP 28 of 1998 before Rent Control Court, Aluva to evict the legal heirs of deceased Narayanan, contending that Narayanan was the tenant of the building now occupied by the appellant and on the death of Narayanan his rights devolved on his wife and children. Defendants in the suit disputed the title of first respondent. Rent Control Court, under Ext.A11 order found that there is a bonafide dispute of title and directed first respondent to approach the civil court. First respondent thereafter instituted O.S.167 of 2000 on 15.4.2000 seeking a decree for permanent prohibitory injunction restraining appellant and others from carrying out any resconstruction in the building. No decree for recovery of possession was sought for and it was only a suit for injunction. Subsequently O.S.500 of 2000 was filed on 13.11.2000 seeking a decree for recovery of possession on the strength of title. The suit was resisted by defendants disputing the title as well as the right to recover

possession. It was also contended that suit is barred under Order II Rule 2 of Code of Civil Procedure in view of the omission to claim a decree for recovery of possession in O.S.167 of 2000.

2. Learned Munsiff on the evidence of PW1 and Exts.A1 to A18 and Ext.C1 and C1(a) dismissed the suit holding that suit is barred under Order II Rule 2 of the Code and without terminating tenancy by sending a notice under Section 106 of the Transfer of Property Act, first respondent is not entitled to recover possession of the building. First respondent challenged the decree and judgment before Additional District Court, North Paravur in A.S.2 of 2005. Learned Additional District Judge, on reappreciation of evidence, set aside the findings of learned Munsiff and held that suit is not barred under Order II Rule 2 of the Code as the original suit was only one for injunction and the latter suit was for recovery of possession and not on the same cause of action. Learned District Judge also found that as defendants are not claiming that they are tenants, no notice under Section 106 of the Transfer of Property Act is warranted, as the suit was instituted consequent to Ext.A11 order as the tenancy was disputed and findings of learned Munsiff is

unsustainable. Upholding the title under Ext.A1 to A3 as well as the bonafide need as provided under Section 11(3), learned District Judge granted a decree for recovery of possession on the ground provided under Section 11(3) of Kerala Act 2 of 1965. The decree and judgment are challenged in the second appeal.

3. Learned counsel appearing for appellant and learned counsel appearing for respondent who appeared consequent to the aplication filed under Section 5 of Limitation Act to condone the delay in filing appeal, were heard.

4. Learned counsel appearing for appellant challenged that the decree granted by first appellate court on the ground that the claim for recovery of possession was available to first respondent when O.S.167 of 2000 was filed on 15.4.2000 and as first respondent omitted to claim a decree for recovery of possession, under Sub rule 2 of Rule 2 of Order II, the suit is barred and the finding of learned District Judge is unsustainable. Reliance was placed on the decision of Apex Court in **Sidramappa V. Rajashetty and others** (AIR 1970 SC 1059).

5. Learned counsel appearing for first respondent submitted that the plea under Order II Rule 2 is not sustainable without producing the pleadings in the earlier suit as well as the

judgment and as the plaint and written statement of O.S.167 of 2000 were not produced, appellant cannot be heard to contend that suit is barred under Order II Rule 2. Reliance was placed on the decision of Apex Court in **Bengal Waterproof Limited V. M/s. Bombay Waterproof Manufacturing Company and another** (AIR 1997 SC 1398) and a Division Bench decision of this court in **K.S.E.B V. Abraham** (2006(4) KLT 770). Relying on the decision of Apex Court in **Inacio Martins V. Narayan Hari Naik and others** (AIR 1993 SC 1756) and **Kunjan Nair Sivaraman Nair V. Narayanan Nair** (AIR 2004 SC 1761) learned counsel argued that as the cause of action in the first suit, which was only a suit for injunction, was different from the cause of action for the latter suit, which was for recovery of possession, the second suit is not barred under Order II Rule 2 of the Code. Relying on the decision of the High Court of Punjab in **Prakash Aggarwal V. Haryana Financial Corporation, Chandigar(** AIR 1999 Punjab and Haryana **225)** learned counsel argued that as O.S.167 of 2000 was withdrawn with liberty to file a fresh suit as evidenced by Ext.A16 judgment and so in any event the subsequent suit is not barred under Order II Rule 2.

6. Though learned counsel appearing for appellant vehemently argued that the failure to seek a decree for recovery of possession in O.S.167 of 2000 would attract the bar provided under sub rule 2 of Rule 2 of Order II, I cannot agree with that submission. Rule 1 of Order II mandates that every suit as far as practicable be so framed, so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 provides what all claims are to be included in the plaint. Sub rule 1 of Rule 2 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. In view of sub rule 1, a plaintiff has to include the whole of the claim which he is entitled to make in respect of the cause of action. At the same time in order to bring the suit within the jurisdiction of that court where he is instituting the suit, he is entitled to relinquish any portion of his claim. Sub rule 2 provides the consequence of relinquishment or omission of a portionof the claim. Under Sub rule 2, whether a plaintiff omits to sue in respect of any portion of his claim or intentionally relinquishes any portion of the claim,

he shall not afterwards sue in respect of the portion so omitted or relinquished. Sub rule 2 deals with the effect of an omission or relinquishment of a portion of the claim in a suit as under rule 1 the plaintiff has to prevent further litigation and sub rule mandates that he is to include the whole of the claim in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of the claim which he should have included in the plaint he shall not afterwards sue in respect of the portion so omitted or relinquished. Therefore the omission or relinquishment which bars the institution of a subsequent suit could only be an omission or relinquishment of a portion of the claim in respect of the same cause of action. It has no application if the subsequent suit is in respect of a different cause of action. Sub rule 3 of Rule 2 provides that if a person who is entitled to more than one relief in respect of the same cause of action omits to do so except with the leave of the court, he shall not afterwards sue for any relief so omitted. Therefore if the omission to raise a claim in the former suit in respect of the cause of action, if he is entitled to more than one relief was without the leave of the court, sub rule 3 operate as a bar from suing for that relief. But if that omission was with the leave of

the court, there is no bar to sue in respect of the omitted relief. The bar under sub rule 3 is in respect of the same cause of action. Apex Court in Sidramappa's case (supra) considering the cause of action contemplated under Rule 2 of Order II held " The requirement of Order II Rule 2 of Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action means cause of action for which the suit was brought. It cannot be said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings".

7. Failure of first respondent to raise a claim for recovery of possession in O.S.167 of 2000 is not a bar to institute another suit for recovery of possession, as the cause of action was different. The cause of action in a suit for injunction and a suit for recovery of possession are different. The cause of action in respect of the suit for injunction is the apprehended attempt on

the part of the legal heirs of the original tenant to resconstruct the building. The cause of action for the present suit is continuation of the illegal possession of the building by legal heirs of the original tenant, after denying the title of first respondent. In such circumstances the first appellate court rightly held that the second suit is not barred by the provisions of Order II Rule 2.

8. Apex Court in **Inacio Martins's case (**supra) considered the question whether a subseqeunt suit for recovery of possession is barred under Rule 3 of Order II of the Code. It was held

> " It is well known that Order 2, Rule 2, C.P.C is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be

> precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the Rule does not preclude a second suit based on a distinct cause of action. It may be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2, Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. The High Court is, therefore, clearly wrong in its view that the relief claimed is neither relevant nor material".

Dealing with the difference in cause of action it was held

> " Therefore the cause of action for the former suit was based on an

apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think that the High Court was right in concluding that the suit was barred by Order 2, Rule 2(3) of the Code of Civil Procedure. It may be that the subject matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in

> thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference".

The same principle has been followed in **Kunjan Nair Sivaraman Nair**'s case (supra).

9. There is force in the submission of learned counsel appearing for respondent that a plea on the bar under Rule 2 of Order II is not available without producing the pleadings in the former suit. A Constitution Bench of the Apex Court in **Gurbux Singh V. Bhooral** (AIR 1964 SC 1810)considered this aspect and held :

> " In order that a plea of a bar under O.2 R.2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out(1) that the second suit was in respect of

the same cause of action as that on which the previous suit was based: (2) that in respect of that cause of action the plaintiff was entitled to more than one relief;(3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court,omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in

a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O.2, R.2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S.28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under O.2, R.2, Civil Procedure Code. The

> learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under O.2, R.2, Civil Procedure Code was not maintainable".

Apex Court in **Bengal Waterproof Limited**'s case (supra) followed this position. A Division Bench of this court in **K.S.E.B V. Abraham (**supra)also held that without producing the pleading and judgment in the former suit, party is precluded from raising the plea.

10. Finally when the former suit itself was withdrawn the

plea of bar under rule 2 of Order II will not lie. I am supported by the decision of a Single Judge of High Court of Punjab in **Harbhagwan and others V. Punni Devi and others** (AIR 1999 Pubjab and Haryana 223). His lordship held :

> "Assuming, the cause of action in both the suits was based upon title in the suit land and was akin in all the cases, yet, as referred to above, inasmuch the earlier two suits were dismissed as withdrawn with permission to file fresh on the same cause of action, third suit will not be barred by any principle of law".

As no substantial question of law is involved the appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

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